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that case the publishers of copyrighted books agreed among themselves that each would fix a retail price for his copyrighted books and would refuse to sell either copyrighted or uncopyrighted books to any dealer who would not maintain that price. The court held the agreement illegal, since it embraced books unprotected by copyrights as well as those copyrighted, the latter only being proper subjects of regulation. That the combination alone was not enough to render the agreement illegal is indicated by the case of *Park* v. *National Druggists' Assn.* (1903) 175 N. Y. 1, where it was held that patentees might agree that each would fix a price for his article, would sell at a fixed discount to dealers who would agree to maintain that price, and would refuse the discount to dealers who would not so agree.

In *Diamond Match Co.* v. *Roeber* (1887) 106 N. Y. 473, it is laid down that whether or not contracts are in restraint of trade depends on their reasonableness, and this test has not only been generally followed at common law, but is applicable to-day under the New York Anti-Trust Act. 4 COLUMBIA LAW REVIEW 83, 89. The only objection to applying this test to combinations respecting patents or copyrights would be that by virtue of the peculiar privilege granted by the Government, conditions otherwise illegal are allowed; but this statutory privilege can only include those rights which actually are granted, either expressly or by reasonable implication, and, therefore, any other rights claimed must be governed by the same test that is applied to cases where no patent or copyright is involved. A contract fixing a price, limiting territory for selling or restricting output is generally held unreasonable, and so illegal, at common law; but the right to do these things is included in the grant of letters patent, and it cannot be illegal to exercise that right over patented articles. When, however, other rights in addition are claimed, if they cannot be shown to be expressly or impliedly included in the special grant of letters patent they must be subjected to the common law test of reasonableness. Such being the distinctions which the courts have recognized the two New York cases, supra, may be reconciled. In the Park case the patentees claimed the right to combine and agree not to give a discount to any dealer who would not maintain their prices. In the Straus case the publishers claimed the right to combine and agree not to sell any books at all to a dealer who would not maintain their prices. In each case the right to fix prices was included in the grant of patent and copyright respectively—in the former no additional unreasonable restriction was found, while in the latter the restraint of trade in uncopyrighted books was held to be unreasonable.

REASONABLENESS OF A MUNICIPAL ORDINANCE—A QUESTION FOR COURT OR JURY.—Shall the question of the reasonableness of a license fee, imposed by virtue of a municipal ordinance upon property of a telegraph company doing an interstate business, be left for determination to a jury? The view of the United States Supreme Court may be gathered from its two recent decisions in *Atlantic and Pacific Telegraph Co.* v. *Philadelphia* (1903) 190 U. S. 160 and *Postal Telegraph-*

Cable Co. v. *New Hope* (1904) 192 U. S. 205. It is there held that where the reasonableness turns on the amount of the fee charged the question may properly be left to a jury, unless the preponderance of evidence is such as would ordinarily justify the direction of a verdict by the court. Municipal ordinances imposing license fees are of two kinds. First: those whose object is revenue. Such are valid only when enacted in the exercise of a specifically or impliedly delegated power to tax. Second: mere police regulations. Such are valid only when reasonable. In the latter class when the unreasonableness lies in the amount of the fee charged the ordinance is void as being for revenue, and if upon interstate commerce it is void also as being an unconstitutional interference therewith. *Leloup* v. *Mobile* (1880) 127 U. S. 640. In any event it is the reasonableness or unreasonableness which determines the character of these ordinances as valid or void, and for the purpose of the determination of their character no distinction can be drawn between a case in which the unreasonableness consists in too great a restraint upon personal liberty and one in which it consists in an excessive fee; for in every instance it will depend upon the particular circumstances and extrinsic facts. The weight of authority seems to be that such determination is for the court and that evidence to the jury is inadmissible. Dillon Mun. Corp. 4th ed. vol. 1 § 327; *Commonwealth* v. *Worcester* (1827) 3 Pick. 462; *Kneedler* v. *Norristown* (1882) 100 Pa. St. 368; *Buffalo* v. *Webster* (1833) 10 Wend. 99; (contra), *Clason* v. *City of Milwaukee* (1872) 30 Wis. 316.

The constitutional limits of the police power of municipal corporations as agents of the state cannot be exactly defined. There is a wide margin between those limits within which the power clearly may be exercised and those without which it clearly may not be. The only standard for determining the validity of an exercise of that power, as has been said, is the standard of reasonableness. Reasonableness seems to mean reasonably necessary under the circumstances. The circumstances are thus creative of the power. And in determining what power the circumstances create, the act of the legislative body is purely an act of discretion. The question of its having properly exercised its discretion, though dependent upon facts, is itself purely a question of law. The question of the existence of the particular circumstances, which the legislative body may have considered to have justified its act, is a question of fact, and, in answering it, the assistance of a jury might properly be required. Determining, however, whether those circumstances did justify the legislative act is passing upon the validity of an exercise of legislative discretion, and the question should remain with the court. It seems that the court have so regarded this question from very early times, and it is believed that it is only recently that there has been any inclination to depart from the old rule. *Vinters' Co.* v. *Passey* (K. B. 1757) 1 Burr 235; *Paxton* v. *Sweet* (N. J. 1832) 1 Green L. R. 290.

The practical objections to the new rule are strong. The reasonableness of the ordinance is the test of its validity, and this is submitted to a jury drawn from the community of voters whose act it is. The law of the nation is left in its final application to the wishes of the communities, and that such application will vary with the com-

munity is inevitable. The same jurisdiction will declare void identical ordinances intended to apply to identical circumstances according to a trifling weight of evidence, or as the honesty or intelligence of a jury vary. Already the question of the reasonable amount of license fees is one of considerable uncertainty and it has been held to include anything from the cost of issuing the license merely, to the expense of inspection, the possible liabilities to which the corporation may be subjected, and a rental charge for the use and occupation of the corporation's property. Dillon Mun. Corp. 4th ed. vol. 1 § 357; Cooley on Taxation 1141; Cooley on Con. Lim. 283; *St. Louis* v. *Western Union* (1892) 148 U. S. 92; *Western Union* v. *New Hope* (1901) 187 U. S. 419. To secure even partial uniformity in the construction of the clause of the Constitution granting to the Federal government the power to regulate commerce it would seem better to leave the question entirely with the court.